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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 477

AMERICAN PUBLIC POWER ASSOCIATION, THE CITY OF JAMESTOWN, NEW YORK, HANCOCK-WOOD ELECTRIC COOPERATIVE, INC., OF NORTH BALTIMORE, OHIO, AND NORTHWESTERN RURAL ELECTRIC COOPERATIVE ASSOCIATION, INC., OF CAMBRIDGE SPRINGS, PENNSYLVANIA, *Petitioners*

v.

POWER AUTHORITY OF THE STATE OF NEW YORK, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Public Power Association, the City of Jamestown, New York, Hancock-Wood Electric Cooperative, Inc., of North Baltimore, Ohio, and Northwestern Rural Electric Cooperative, Inc., of Cambridge Springs, Pennsylvania, respectfully pray that a writ of certiorari issue to review the judgment of the

United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on June 20, 1957, which set aside an order of the Federal Power Commission.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (R. 47-75), dated June 20, 1957, are printed in the Appendix hereto (Appendix A, *infra*, pp. 1a-29a). They are not yet reported. The opinion of the Federal Power Commission and the order dismissing respondent's application for a license (R. 34-42) are printed in the Appendix hereto (Appendix B, *infra*, pp. 30a-39a). The Commission's order denying rehearing (R. 46) is also printed in the Appendix (Appendix C, *infra*, p. 40a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (R. 76). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Was the Senate's reservation to the 1950 Niagara Treaty with Canada, which provided:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress"

effective in withholding jurisdiction from the Federal Power Commission to issue a license under the Federal Power Act for the utilization of the additional flow made available by that Treaty for development in the United States?

2. Has the judgment of the Circuit Court of Appeals which denied effect to the Senate Reservation to the 1950 Treaty with Canada, and held the Federal Power Act applicable to the additional development of the Niagara River authorized by that Treaty, been rendered moot by the Act of August 21, 1957, authorizing issuance of a license to the New York Power Authority upon special terms and conditions not contained in the Federal Power Act; and, if so, should the judgment of the Circuit Court of Appeals be vacated, and the case remanded with instructions to dismiss as moot the Authority's petition for review of the Federal Power Commission order which declined jurisdiction under the Federal Power Act?

STATUTE AND TREATY INVOLVED

The 1950 Treaty between the United States and Canada is set forth at pp. 25-32 of the Record. (1 U.S.T. 694) The reservation is quoted, *supra*, in the "Questions Presented".

The Act of August 21, 1957, 71 Stat. 401, is reprinted as Appendix D, *infra*, p. 41a.

STATEMENT

On February 27, 1950, negotiators representing the United States and Canada signed a Treaty to provide for the beneficial use of the waters of the Niagara River and for the preservation and enhancement of the scenic values of the Niagara Falls and River. The

proposed Treaty increased the permissible flow of the Niagara River available to the United States and Canada for power purposes. This limit had been fixed, for each nation, as 20,000 cubic feet per second under the 1909 International Boundary Waters Treaty between the two governments, temporarily increased to 32,000 cubic feet per second by an exchange of notes in 1941. The average flow now available to the United States for power development is estimated as 65,000 cubic feet per second.

The flow available before the 1950 Treaty has long since been fully licensed under the Federal Power Act. These licenses are not affected by the Treaty. The controversy here relates only to the additional quantity made available by the Treaty.

The Treaty was transmitted to the Senate by the President on May 20, 1950. The President's message stated in part:

> ". . . All this treaty does is to make additional water legally available for power purposes in each of the two countries. This is a step which must be taken in the interest of the United States. It is one which should be left separate from the steps which must be taken in this country in order to convert this water into additional power." (Senate Executive N, 81st Cong., 2d Sess. (1950).)

After holding hearings, the Senate Committee on Foreign Relations favorably reported the Treaty, provided that the Senate condition its consent to the Treaty upon the adoption of the following reservation:

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit of

the United States share of the waters of the Niagara River made available by the provisions of the Treaty and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress."

The Committee Report explained the reasons for the reservation as follows:

"'The committee is aware that much of the treaty cannot be put into effect without implementing legislation. Nevertheless, in order to relieve the acute power shortage in Canada, it considers action should be taken first on the treaty without reference to any implementing legislation. The committee therefore makes its recommendation for advice and consent to the ratification of the treaty without any reflection on any implementing legislation now before the Congress or to be presented to the Congress in the future. It is the committee's view that any legislation must be gone into carefully and measured in terms of the interests of the people of the United States. This will in all probability require public hearings and should not be permitted to delay ratification of the treaty. * * *'" (S. Exec. Rep. No. 11, 81st Cong., 2d Sess., 6-7 (1950).)

The Report noted that:

". . . without the reservation the redevelopment for power purposes would be governed by the Federal Power Act. The committee intends by the reservation to retain that power in the hands of Co ress." (p. 7.)

On August 9, 1950, the Senate gave its consent to the Treaty only after adopting the Committee reservation (96 Gong. Rec. 12094).

The President made no request that the Senate reconsider the reservation. Instead, on August 17, 1950, the State Department officially notified the Canadian Government that Canadian acceptance of the reservation was necessary before the United States could agree to final ratification. This notification stated in part:

> "Any ratification of the treaty by the President of the United States will, of necessity, be made subject to the reservation required by the Senate resolution. *Before the treaty is ratified on the part of the United States it is desirable that this notification with respect to the reservation be communicated to your Government and that my Government be notified whether that reservation is acceptable to the Canadian Government.. In the event the reservation is acceptable, the Department of State will undertake promptly, upon the receipt of notification to that effect, to complete arrangements for the issuance by the President of his ratification of the treaty and for transmittal of the ratification to the American Embassy at Ottawa with a view to the exchange of instruments of ratification as provided for in Article X of the treaty.*
>
> "It is assumed that, in accordance with the customary practice in such cases, there will be signed on the occasion of the exchange of ratifications a protocol which, without constituting a new agreement between the Governments, will serve as formal evidence of the exchange. In this connection, *my Government considers it necessary for the protocol of exchange to contain a statement indicating that the United States ratification is subject to the above-mentioned reservation and that the reservation is acceptable to the Canadian Government.*" (Letter dated August 17, 1950, to W. D. Matthews, Charge d'Affaires ad interim of

Canada in Washington, from Adrian S. Fisher, Legal Adviser of the Department of State.) (Emphasis supplied.)

On August 24, 1950, the President ratified the Treaty subject to the reservation for the United States.

On September 21, 1950, the Canadian Ambassador officially replied to the United States Secretary of State:

> "The terms of this reservation were forwarded to the Canadian Government, and *I am now instructed to advise you that the Canadian Government accepts the United States reservation.* The Canadian Government agrees with your suggestion that its acceptance of the reservation be indicated by a statement to be included in the Protocol of exchange of ratifications." (Emphasis supplied.)

The Canadian Government subsequently ratified the Treaty on October 5, 1950. The formal exchange of ratifications took place in Ottawa on October 10, 1950, and was recorded in a "Protocol of Exchange" (Canada Treaty Series, 1950; No. 3, p. 14) in which the existing joint agreement on the reservation was stated. Thereafter, the Treaty, including the reservation, was announced by the President of the United States by formal proclamation. In accordance with the provisions of Article X, the Treaty entered into force on October 10, 1950.*

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* In 1929 a proposed treaty had been signed between the United States and Canada to permit increased diversions for power purposes by a designated licensee under the terms of the Federal Power Act, coupled with scenic improvements to the Falls area. The President transmitted it to the Senate for its advice and consent. The Treaty died in the Senate (*Foreign Relations of the United States*, 1936, Vol. I, pp. 834-836).

On August 20, 1956, the Power Authority of the State of New York, a corporate municipal instrumentality of the State of New York, made application to the Federal Power Commission for a license under Section 4(e) of the Federal Power Act to construct a power project to utilize all of the United States share of the increased waters of the Niagara River covered by the 1950 Treaty. The Power Authority attacked the reservation precluding the Federal Power Commission from extending its jurisdiction to the new waters covered by the Treaty, contending that it was never validly a part of the treaty, and was unconstitutional. The Federal Power Commission granted petitions to intervene, including those of the present petitioners.

The Commission's Opinion and Order dismissing the respondent's application for a license issued on November 30, 1956. The Commission found it clear:

> "... that the purpose of the reservation was to require further action by Congress prior to redevelopment of the power site at Niagara Falls. ... it is entirely authoritative with us as 'the supreme Law of the Land' under Article VI of the Constitution."

and held:

> "We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York." (R. 37-39).

A petition for rehearing was denied on January 2, 1957.

The New York Power Authority petitioned the Court of Appeals for the District of Columbia Circuit

to review the order of the Federal Power Commission (R. 1-7). The present petitioners intervened.

By a divided decision, two to one, the Court of Appeals reversed the Federal Power Commission, holding that the reservation was merely "an expression of the Senate's desires and not a part of the Treaty." (R. 56; *infra*, 10a). The dissenting opinion significantly pointed out the implication, in the majority opinion, "that this reservation, if a part of the treaty, would be invalid." (R. 64; *infra*, 18a). The majority, however, expressly disavowed that they were deciding this constitutional question.

Excluding all of the authorities cited by the majority which could only be relevant if in truth the constitutional validity of the reservation were in issue, it appears that the decision below rests upon a conclusion (a) that the reservation was not a part of the Treaty because never validly accepted by Canada, the Canadian Parliament never having acted upon it, despite the formal acceptance of the reservation by the Canadian Government; and (b) that since the Senate and President knew in proposing the reservation that it was of domestic concern, they did not intend for the reservation to become a part of the Treaty. The Court said:

> "A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. But such matter does not become a part of the treaty." (R. 53; *infra*, 7a)

Accordingly, the court below in its decision of June 20, 1957, set aside the order of the Federal Power Commission and ordered the case remanded to the

Commission for proceedings under the Federal Power Act.

After the decision of the Court of Appeals below, and after the time within which that court had jurisdiction to vacate its Judgment, but within the period available for filing of a petition for certiorari in this Court, Congress passed H.R. 8643, which was signed by the President on August 21, 1957 (Public Law No. 85-159; 71 Stat. 401; Appendix D).

The Act of August 21, 1957, expressly authorizes and directs the Federal Power Commission to issue a license to the Power Authority of the State of New York, subject to various licensing conditions in addition to those required under the Federal Power Act. These additional conditions require the Authority, in disposing of power, to give preference to municipal and other public power agencies; require a portion of the power to be made available for use in states other than New York; require the power licensee to contribute to the scenic enhancement of the area provided for by the 1950 Treaty, at a cost of $15,000,000; require the Power Authority, as licensee, to pay for the United States share of the cost of the construction of the "remedial works" undertaken in accordance with the Treaty, whenever such remedial works are constructed; and so on.

These petitioners objected to the issuance of a license under the Federal Power Act, which the judgment below would compel, absent the conditions which the 1957 legislation has superimposed. They do not object to the issuance of a license if it contains these

conditions and if the Power Authority can lawfully accept them (a question not before the court). They believe that the judgment below is of grave importance, is wrong on the merits, has probably, although not certainly, been rendered moot by the 1957 legislation, enacted after its entry, and should be vacated on certiorari.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS BELOW IN HOLDING THAT THE "RESERVATION" TO THE 1950 NIAGARA TREATY ADOPTED BY THE SENATE, INCLUDED IN THE TREATY AS RATIFIED BY THE PRESIDENT AND ACCEPTED BY CANADA, IS NOT A VALID PART OF THE TREATY, HAS DECIDED AN IMPORTANT QUESTION OF THE PRESIDENT'S AND SENATE'S TREATY-MAKING POWER, WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

This is believed to be the first time that a "reservation" by the Senate in giving advice and consent to the ratification of any treaty has ever been invalidated by any court or authority in the United States.*

The court below rejected the reservation on the ground that it was merely an "expression of the Senate's desires and not a part of the Treaty." (R. 56; *infra*, p. 10a). But if the procedure followed by the Senate and President in adopting the Niagara reservation is not sufficient to qualify that reservation as an integral part of the Treaty, then it is difficult to perceive how the Senate and President could propose any reservation or amendment to a treaty, once negotiated, that could ever be made effective.

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* See Henkin, *The Treaty Makers and the Law Makers: The Niagara Reservation*, 56 Col. L.R. 1151 (1956).

As noted by Mr. Corwin,* the Senate in performing its treaty function has several options:

> ". . . It may consent unconditionally to a proposed treaty, or it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty or of reservations to the act of ratification, the difference between the two being that, whereas amendments, if accepted by the President and the other party or parties to the Treaty, change it for all parties, reservations limit only the obligations of the United States thereunder."

The President made no request that the Senate reconsider the reservation and in no way indicated that he thought the reservation illegal or unwise:

> ". . . the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiations, which he is entirely free to do." (Corwin, *The Constitution of the United States of America*, S. Doc. 170, 82nd Cong., 2d Sess., p. 413 (1953).)

Instead, a clear notification was sent to the Canadian government that the United States ratification of the Treaty was conditioned upon the acceptance by Canada of the reservation. The President's unilateral ratification of the Treaty on August 24, 1950, prior to the acceptance by Canada, is no indication, (contrary to what the court below said), that the reservation can be disregarded, because (a) the President's ratification

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* Edwin S. Corwin, *The Constitution of the United States of America*, S. Doc. No. 170, 82d Cong., 2d Sess., p. 413 (1953).

incorporated the reservation, and (b) the important act, as stated in the State Department notification is the "exchange of instruments of ratification as provided for in Article X of the treaty". (R. 30) The exchange of ratifications took place on October 10, 1950, *after* the official Canadian note of acceptance to the United States of September 21, 1950. The reservation was formally recorded in the "Protocol of Exchange" and announced as part of the Treaty by the President in his formal proclamation.

The only case cited by the majority below, *New York Indians* v. *United States*, 170 U.S. 1 (1898) is clearly distinguishable. There one of several Senate "provisos" to an Indian treaty was held inoperative by the Court because it was not included in the original or in the published copy of the treaty or in the President's proclamation and did not appear to have been called to the attention of the tribes, who would "naturally assume that the treaty, embodied in the presidential proclamation, contained all the terms of the arrangement." (p. 23) The Court there noted (p. 22) that: "This is the more remarkable, as every other amendment made by the Senate appears in the treaty as published, while no reference whatever is made to this . . ." These "other amendments" were given legal effect by the Court as part of the treaty.

A case not cited by the majority below, but applicable here, is oft-cited *Doe* v. *Braden*, 16 How. 635 (U.S. 1853), where this Court held:

> "[I]t is too plain for argument that where one of the parties to a treaty, at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding

> a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged—the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratifications were exchanged." (p. 656).

The conclusion of the court below that the reservation was not a part of the Treaty because never ratified *per se* by the Canadian Parliament raises serious questions of Canadian, as well as international law.* If courts of one country may go behind the Executive's formal protocol of exchange of ratifications to ferret out the foreign procedural requirements of the other, pass upon their performance, and ascertain portions of the treaty deemed not in accord with the domestic law of that foreign country, then a kaleidoscope of perplexing international problems may be posed (*United States* v. *Pink*, 315 U.S. 203, 233 (1942), *Underhill* v *Fernandez*, 168 U.S. 250, 252 (1897)). Who can say, for example, what concurrence the ruler of an Arab state must obtain from his council of chieftains to validate his acceptance of an American Senate treaty reservation? This is the President's responsibility, not the Court's. As far as United States courts are concerned, the Proclamation of the Treaty by the President is conclusive that the reserva-

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* Canada has made no contention that the reservation is not "part" of the Treaty. Canada may well be estopped from ever asserting that the reservation was not validly accepted by her, for she had an interest in having the Treaty in a form which would facilitate its acceptance by the United States Senate, and her action permitted acceptance of the whole Treaty by the United States to the benefit of Canada.

tion is part of the Treaty. Neither the courts nor an administrative agency may properly impeach the President's political judgment as to what terms and conditions were adopted as integral parts of the treaty. *United States* v. *Reid*, 73 F. 2d 153, 156 (9th Cir. 1934); *cf. Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1917).

If the decision below rests upon a holding that the reservation is not part of the treaty because it concerned only domestic matters,* then a serious limitation is placed on the Senate's and President's traditional** treaty-making powers. It has long been es-

* This would seem to clearly pose the "constitutional question" of the validity of such a reservation which the court stated it declined to decide, for it rests on the assumption that there is something inherently defective due to the *nature* of the reservation, which has little to do with whether the objective words contained in the reservation clause were or were not in fact adopted as part of the final treaty. The only "inherent defect" could be some superior prohibition, i.e., the Constitution.

** Reservations to treaties in order to condition their operation as domestic statutes are not uncommon. The Mexican Water Treaty (U.S. Treaty Series, 994, 59 Stat. 1219 (1945)) between the United States and Mexico, affecting the Colorado, Rio Grande and Tia Juana Rivers, contains eleven Senate reservations in some detail which prevented the self-executing provisions of the treaty from going into effect until Congress so legislated. This Treaty was featured in the arguments of the present case, both before the Commission and the Court of Appeals, in which the Power Authority directly argued that the Mexican Water Treaty reservations were invalid. Some examples of reservations, "understandings" or "agreements" attached by the Senate to other treaties which would be similarly affected: *Statute (Treaty) of the International Atomic Energy Agency* (any amendments to treaty must be submitted to Senate for advice and consent, and the United States will withdraw if any amendment adopted later fails of Senate approval. A further reservation denying the availability of fissionable material in the absence of Congressional action

tablished that United States treaties, under the Constitution, may have a dual effect of international agree-

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was defeated by a vote of 55-31. See 103 Cong. Rec. pp. 8447-68, 8491-8534, June 18, 1957); *Mutual Defense Treaty with China, 1955* (applicable only in event of external attack); *Geneva Convention for Protection of War Victims, 1955* (right to use Red Cross emblem, impose death penalty regardless of local law); *Convention of Intergovernmental Maritime Consultative Organization, 1950* (nothing to affect domestic antitrust or commercial law); *Charter of Organization of American States, 1950* (nothing to enlarge or limit laws and rights of the states of the United States under the Constitution); *Friendship, Navigation and Commercial Treaties of 1953 with Israel, Denmark, Greece and Japan* (no professional person may practice without meeting the requirements of state laws). See also *International Boundary Water Treaty with Canada, 1909* (nothing should affect territorial or riparian rights in St. Mary's River); *Commercial Treaty with Japan, 1911* (no constructive repeal of Act of February 20, 1907, regulating immigration of aliens—see to same effect *Treaty with Germany, 1923*); *Treaty with Colombia, 1914* (free passage for Colombian troops and warships through Panama Canal not applicable in case of war between Colombia and any other country); *Treaty of friendship with Austria, 1921* (U.S. not to be represented or to participate in any group in which U.S. authorized to participate under treaty until a Congressional act should so provide); *Treaty of friendship, commerce and consular rights with Austria, 1928* (termination of prohibitions against shipping discrimination reserved); *Sockeye salmon convention with Canada, 1930* (no fishing gear contrary to laws of Washington and Canada to be authorized by Fisheries Commission); *Extradition Treaty with Costa Rica, 1922* (no person to be extradited upon whom death penalty can be inflicted in U.S. for offense charged, insisted upon by Costa Rica—see same provision in *Treaty with Portugal, 1908*); *Reciprocal military service convention with Great Britain, 1918* (exemption of American citizens in Great Britain if in exempt age groups under American law); *General Act of Algeciras, 1908* (affecting Morocco—only U.S. purpose to promote comity and interests of its citizens, not to participate in foreign political questions); *Revision of General Acts of Berlin and Brussels, 1919* (disputes to be submitted to court of arbitration under Hague Convention. In consenting to Hague Convention of 1907, the Senate inserted a reservation that recourse to

ment and self-executing domestic law.* Chief Justice Marshall in the leading case of *Foster* v. *Neilson*, 2 Pet. 253, 314 (U.S. 1829), distinguished treaties which are self-executing from those which are not, as follows:

> "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> "In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be

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the Permanent Court "can be had only by agreement thereto through general or special treaties" which must of course go to the Senate prior to ratification); *London Naval Treaty, 1930* (consent subject to firm understanding there were no secret documents or agreements modifying treaty provisions); *Brussels convention on uniform rules for bills of lading covering carriage of goods by sea, 1924* (monetary values in bills of lading subject to Congressional act. The President waited until 1936, when Congress passed the act in question, before ratifying. When possible conflict between the act and convention then appeared the Senate stipulated the act should prevail); *Treaty of 1854 with Britain concerning Canada* (effect on domestic revenue laws—to same effect, *Treaty of 1875 with Hawaii*). See generally, V HACKWORTH, INTERNATIONAL LAW (1940), pp. 101-153; Corwin, *Constitution of the United States*, S. Doc. 170, 82d Cong., 2d Sess., p. 413 (1953); Henkin, *The Treaty Makers and the Law Makers*, 56 Col. L. R. 1151, 1169-1181 (1956); MILLER, RESERVATIONS TO TREATIES (1919).

* Parliamentary legislation is required in Britain and Canada to make a treaty effective as domestic law, notwithstanding its self-executing terms, whereas in the United States a treaty is immediately effective as domestic or internal law throughout the land. See Deutsch, *Eminent Domain Under a Treaty*, 43 A.B.A. Journal 699, 701 (1957). The Senate reservation would accomplish the same result for the United States on the Niagara Treaty as was automatic in Canada.

regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."

The distinction was further reiterated by Justice Field for the Court in *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888):

"... A Treaty is primarily a contract between two or more independent Nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. *When the stipulations are not self executing they can only be enforced pursuant to legislation to carry them into effect*, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. *If the Treaty contains stipulations which are self executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.*" (Emphasis supplied.)

See also *Edye* v. *Robertson*, 112 U.S. 580, 598 (1884); *Cook* v. *United States*, 288 U.S. 102, 118-119 (1933).

The question is not involved here as to whether, by reservation to a treaty, the Senate may substantially amend or repeal a domestic statute, theretofore operative as to international waters, so as to make it inoperative thereafter. Instead, the question is whether, by reservation, the Senate may suspend the implied extension of an existing statute to a *new*

subject matter created by the treaty to which the reservation is annexed. The Senate reservation preserved the *status quo;* it made no new domestic law, but reserved that function to Congress. This was a salutary example of the proper use of a reservation. The opinion below denies the Senate that option. Legislation, it implies, must precede or accompany the treaty: a reservation cannot prevent the self-executing effect of the treaty as domestic law.

Professor Henkin has aptly put the matter as follows:

> "Now we are told that because it did not choose to delay the treaty, the Senate failed to make its desired condition effective and the treaty is law despite the Senate. It is not difficult to guess what the Senate would do the next time if the views of the Authority prevailed. Exactly whose interests or what purpose would be served by requiring the Senate thus to delay ratification is difficult to conceive."
> (Henkin, *supra,* note p. 11 at p. 1182)

2. THE JUDGMENT BELOW HAS PROBABLY BEEN RENDERED MOOT BY THE ACT OF AUGUST 21, 1957, AND, IF SO, THE ESTABLISHED PRACTICE IS TO REVERSE OR VACATE THE JUDGMENT BELOW, AND REMAND WITH A DIRECTION TO DISMISS

A. As to whether the 1957 statute has rendered the judgment below moot:

The function of the 1950 Treaty reservation, if given full effect, was to reserve to Congress the opportunity to enact special legislation governing utilization of the additional flow of the Niagara River. Despite the judgment below, denying effect to that objective, the Congress, during the ninety-day period available for petition to this Court for review of that judgment, has

exercised that right and has enacted special Niagara legislation, superimposed on the structure of the Federal Power Act. The question of whether the Treaty reservation could or could not validly preclude proceedings under the Federal Power Act is thus probably rendered moot. We say "probably" because the 1957 act is not plainly exclusive, and requires action from the Authority which it has said in other proceedings before the Federal Power Commission would be ultra vires. Specifically, we refer to the obligations stated in the new act to recognize preference rights in public agencies, and to recognize the rights of other states to a share of Niagara power: commitments which the Authority has in the past denied could be undertaken under its own charter.

B. If rendered moot by the 1957 act, the judgment below should be reversed or vacated and the case remanded to the Court of Appeals with instructions to dismiss the petition for review

Unless reversed or vacated, the judgment below is res judicata that a Senate reservation was ineffective to accomplish its purpose. It is not right that these petitioners be left in the position of having their claims to the protection of the Senate reservation adjudicated adversely to them, and then be precluded from obtaining review of that judgment solely in consequence of enactment of the very statute designed to occupy the field reserved by the Senate reservation, but which may or may not accomplish that purpose, depending upon future events. The public importance of the question decided adversely below adds emphasis to the problem.

The Court has evolved a practice which disposes of such cases.

Where a case has become moot after the judgment below, the "established practice" is to "dispose of the case, not merely of the appellate proceedings which brought it here," and, to do so, "to reverse the judgment below with directions to dismiss the bill, complaint or petition." *Brownlow* v. *Schwartz*, 261 U.S. 216, 218 (1923), citing cases. Substantially the same phraseology appears in *United States* v. *Anchor Coal Co.*,* 279 U.S. 812 (1929).

In *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), it was held that a judgment which had become moot was nevertheless res judicata. Mr. Justice Douglas said, for the Court (p. 39):

> ". . . If there is hardship in this case it was preventable. The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in Duke Power Co. v. Greenwood County, 299 U.S. 259, 267, 81 L. ed. 178, 18[illegible] 57 S. Ct. 202, to be 'the duty of the appellate court.' "

A footnote (p. 39) states that "this has become the standard disposition in federal civil cases," citing thirty-two cases. Later cases conform to the same practice, e.g., *McKay* v. *Clackamas County*, 349 U.S. 909 (1955); *Garcia* v. *Landon*, 348 U.S. 866 (1954).

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* Where the case has become moot, after the judgment below but before this Court has taken jurisdiction, there is, of course, no necessity to dispose "of the appellate proceedings which brought it here" because it is not yet here, but on principle, there is just as strong necessity to "dispose of the cause, not merely of the appellate proceedings. . . ." In either event the lower court's judgment, though moot, is res judicata unless reversed.

The rule has been applied in cases rendered moot by legislation, e.g., *United States* v. *Alaska S. S. Co.*, 253 U.S. 113, 116 (1920); *Board of Public Utility Commissioners* v. *Compania General de Tabacos*, 249 U.S. 425 (1919); *Bryan* v. *Austin*, — U.S. —, 1 L. ed. 2d 1527 (1957).*

These reasons for vacating an adjudication which has been rendered moot by legislation apply with particular force to a case of the public importance and gravity of this one.

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* See Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1. Professor Scott concludes (p. 16): "In situations like this where the controversy has become moot before the appellate court has made its decision, it would seem that the better practice is not merely to dismiss the appeal, but to dismiss the suit or direct the lower court to do so. The result then clearly is that the matter will not be res judicata, since there is no judgment on the merits."

See also the annotation appearing at page 42, 95 L. ed.; *cf. South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892); *Leader* v. *Apex Hosiery Co.*, 108 F. 2d 71 (3rd Cir. 1939), aff'd. 310 U.S. 469 (1940).

CONCLUSION

The judgment below is wrong, we respectfully maintain, and it ought to be reversed on the merits. If review of such an important decision on the merits is not available because of enactment of legislation which may have rendered the judgment moot, then it ought to be vacated upon that ground. For these reasons, we believe that this petition for certiorari should be granted.

Respectfully submitted,

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September 18, 1957

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 13652

POWER AUTHORITY OF THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ONEIDA MADISON ELECTRIC COOPERATIVE, et al., Rural Electric Distribution Cooperatives), PEOPLE OF THE STATE OF NEW YORK, ROCHESTER GAS AND ELECTRIC CORPORATION, AMERICAN PUBLIC POWER ASSOCIATION, and the CITY OF JAMESTOWN, NEW YORK, INTERVENORS

On Petition to review an order of the Federal Power Commission

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Decided June 20, 1957

Mr. Philip C. Jessup, with whom *Mr. Thomas F. Moore, Jr.*, was on the brief, for petitioner.

Mr. Willard W. Gatchell, General Counsel, Federal Power Commission, with whom *Messrs. John C. Mason*, Deputy General Counsel, Federal Power Commission, and *Joseph B. Hobbs*, Attorney, Federal Power Commission, were on the brief, for respondent. *Mr. Howard E. Wahrenbrock*, Assistant General Counsel, Federal Power Commission, also entered an appearance for respondent.

Mr. John Davison, a member of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, for intervenor, People of the State of New York.

Mr. Henry H. Fowler also entered an appearance for intervenor, People of the State of New York.

Mr. Lawrence Potamkin was on the brief for intervenor, Oneida Madison Electric Cooperative, Inc., and certain other intervenors.

Mr. T. Carl Nixon was on the brief for intervenor, Rochester Gas and Electric Corporation.

Messrs. Northcutt Ely, Robert L. McCarty, C. Emerson Duncan II, and *Charles F. Wheatley, Jr.*, were on the brief for intervenors, American Public Power Association, and the City of Jamestown, New York.

Before EDGERTON, Chief Judge, and BAZELON and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* Petitioner, an agency of the State of New York, applied to the Federal Power Commission for a license to construct a power project to utilize all of the Niagara River water which, under the 1950 treaty between the United States and Canada,[1] is available for American exploitation.

In consenting to the treaty, the Senate had attached the following "reservation":

> "The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States share of the waters of the Niagara River made available by the provisions of the treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress. [1 U.S.T. 694, 699.]"

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[1] Treaty Between the United States and Canada Concerning Uses of the Waters of the Niagara River, Feb. 27, 1950, 1 U.S.T. 694.

The Commission dismissed petitioner's application on November 30, 1956, in an opinion and order declaring:

> In the absence of the treaty reservation we would act on the Power Authority's application in accordance with the provisions of the Federal Power Act. But if we are to accept the injunction of the reservation as it stands, we would have no authority to consider the application of the Power Authority on its merits.
>
> * * *
>
> Since the resrvation here was intended by the Senate as part of the treaty and was intended to prevent our jurisdiction attaching to the water made available by the treaty, it is entirely authoritative with us as the Supreme Law of the Land under Article VI of the Constitution. . . .
>
> * * *
>
> We are without authority to issue a license for the redevelopment (Project No. 2216) proposed by the Power Authority of the State of New York.

An application for rehearing was denied on January 2, 1957, and petitioner brought this review proceeding.

The parties agree that, if the reservation to the 1950 treaty is not "Law of the Land," the order should be set aside. Since the reservation did not have the concurrence of the House of Representatives, it is not "Law of the Land" by way of legislation.[2] The question is whether it became "Law of the Land" as part of the treaty.

The Commission argues that the reservation is an effective part of the treaty because: (1) it was a condition of the Senate's consent to the ratification of the treaty; (2) the condition was sanctioned by the President, was "accepted" by Canada, and was included in the exchange of ratifications; and (3) it "thus became a part of the

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[2] *New York Indians* v. *United States*, 170 U.S. 1, 23 (1898); *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 184 (1901), concurring opinion of Mr. Justice Brown.

Treaty." Simple as this argument seems, we cannot agree with it.

The treaty was signed on behalf of the United States and Canada on February 27, 1950. It defined the quantity of Niagara River water which was to be available for power purposes and provided that it "shall be divided equally between the United States of America and Canada." How each party was to exploit its share of the water was left for that party to decide.

In transmitting the treaty to the Senate on May 2, 1950, the President pointed out that the treaty did not determine how the United States was to exploit its share of the water. He said:

> . . . It is a question which we in the United States must settle under our own procedures and laws. It would not be appropriate either for this country or for Canada to require that an international agreement between them contain the solution of what is entirely a domestic problem.[3]

The Foreign Relations Committee of the Senate agreed that the question was "domestic in nature" and "concerns the United States constitutional process alone." It recommended the reservation because, without it, "the redevelopment for power purposes would be governed by the Federal Power Act. The Committee intends by the reservation to retain that power in the hands of Congress."[4] The Senate accepted the Committee's recommendation and consented to the ratification of the treaty with the reservation on August 9, 1950.[5]

Meanwhile, the Canadian Parliament had approved the treaty as signed, without the reservation. In a note on August 17, 1950, the Legal Advisor of the Department

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[3] SENATE EXECUTIVE N, 81st Cong., 2d Sess. 3.

[4] S. EXEC. REP. NO. 11, 81st Cong., 2d Sess. 7.

[5] 96 CONG. REC. 12095.

of State called the attention of the Canadian Government to the Senate action, saying:

> It appears that, while recognizing the subject matter of the reservation as domestic in nature and concerning the United States constitutional process alone, the Senate considered the reservation necessary in order to make certain that implementation of the treaty on the part of the United States would be made only by specifically authorized acts of Congress and would not be governed by the Federal Power Act.

A week later, without waiting for Canadian reaction to the reservation, the President ratified the treaty subject to the reservation. On September 21, 1950, the Canadian Ambassador, replying to the State Department's note, advised that his government accepted the reservation and would indicate its acceptance "by a statement to be included in the Protocol of exchange of ratifications." Two weeks later, without resubmitting the treaty to Parliament for approval of the reservation, the Canadian Government ratified the treaty. In the Protocol, on October 10, 1950, Canada inserted the following statement:

> Canada accepts the above-mentioned reservation because its provisions relate only to the internal application of the Treaty within the United States and do not affect Canada's rights or obligations under the Treaty.

The Canadian view that the reservation was of purely domestic concern to the United States and of no concern to Canada was shared, as we have shown, by the President, the Department of State and the Senate.

Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms. The effect of such a "consent," by analogy to contract law, is to reject the offered treaty and to propose the variation as a counter-offer which will become a binding agreement

only if accepted by the other party.[6] But, if what the Senate seeks to add was implicit in the original offer, the purported "conditional acceptance" is an acceptance and the contract arises without a further acceptance by the other party being required. RESTATEMENT, CONTRACTS § 60, comment a (1932). The disposition of the United States share of the water covered by this treaty was, even apart from the reservation, something "which we in the United States must settle under our own procedures and laws." The reservation, therefore, made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did "accept" the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest. It is of some significance in this regard that the Canadian Government, although it had submitted the original treaty to the Parliament for its approval, found it unnecessary to resubmit the treaty to Parliament after the reservation was inserted. Also significant is the fact that the President ratified the treaty with the reservation without even waiting for Canada to "accept."

A true reservation which becomes a part of a treaty is one which alters "the effect of the treaty in so far as it may apply in the relations of [the] State with the other State or States which may be parties to the treaty." *Report of the Harvard Research in International Law*, 29 AM.J. INT'L L. Supp. 843, 857 (1935). It creates "a different relationship between" the parties and varies "the obligations of the party proposing it . . . ." 2 Hyde, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND AP-

[6] "A reservation is upon analysis the refusal of an offer and the making of a fresh offer." I Oppenheim, INTERNATIONAL LAW (8th ed., Lauterpacht, 1955) 914.

PLIED BY THE UNITED STATES (2d revised ed. 1945) 1435; International Law Commission, 2d Sess., Report on the Law of Treaties by J. N. Brierly, U.N.Doc. A/CN. 4/23, 14 April 1950, pp. 41, 42-43. The purported reservation to the 1950 treaty makes no change in the relationship between the United States and Canada under the treaty and has nothing at all to do with the rights or obligations of either party. To the extent here relevant, the treaty was wholly executed on its effective date. Each party became entitled to divert its half of the agreed quantum of water. Neither party had any interest in how the share of the other would be exploited, nor any obligation to the other as to how it would exploit its own share. The Senate could, of course, have attached to its consent a reservation to the effect that the rights and obligations of the signatory parties should not arise until the passage of an act of Congress. Such a reservation, if accepted by Canada, would have made the treaty executory. But the Senate did not seek to make the treaty executory. By the terms of its consent, the rights and obligations of both countries arose at once on the effective date of the treaty. All that the Senate sought to make executory was the purely municipal matter of how the American share of the water was to be exploited.

A party to a treaty may presumably attach to it a matter of purely municipal application, neither affecting nor intended to affect the other party. *But such matter does not become part of the treaty.* The Republic of New Granada, in 1857, attached such purely municipal matter to its ratification of a treaty with the United States. The President of the United States treated the added articles as being no part of the treaty. He ratified the treaty without resubmitting it to the Senate, stating in the Protocol of Exchange of Ratifications:

> . . . considering the said articles as in no way affecting the provisions of the said Treaty, but as

> being acts simply of domestic legislation[7] on the part of the Granadian Confederacy, and as implying no reciprocal obligation on the part of the United States, the said exchange has this day been effected in due form. [Miller, RESERVATIONS TO TREATIES (1919) 27.]

The constitutionality of the reservation as a treaty provision was extensively argued by the parties. The respondent merely suggests that "there is no apparent limit" to what may be done under the treaty power, citing *Missouri* v. *Holland*, 252 U. S. 416 (1920). Intervenor Rochester Gas and Electric Corporation puts the proposition more baldly. It defends this reservation as an "exercise of the treaty-making power to legislate in the domestic field . . .," calling our attention to the fact that the Supreme Court has never held a treaty provision unconstitutional.[8] But it has been pointed out that the Court has never had occasion to consider a treaty provision which "lacked an obvious connection with a matter of international concern." 2 Hyde, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (2d revised ed. 1945) 1401. The instant reservation is *sui generis*. There is complete agreement by all concerned that it relates to a matter of *purely domestic* concern.

In *Missouri* v. *Holland*, 252 U. S. at 433, Mr. Justice Holmes questioned, but did not decide, whether there was any constitutional limitation on the treaty-making power other than the formal requirements prescribed for the making of treaties.[9] The treaty he sustained related to a "national interest of very nearly the first magnitude"

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[7] Under our Constitution, of course, such matter added to a treaty cannot be effective as legislation. *Supra* note 2.

[8] But cf. *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *affirmed on other grounds*, 348 U.S. 296 (1955).

[9] The question raised by Mr. Justice Holmes was given an affirmative answer by Mr. Justice Black in *Reid* v. *Covert*, 25 U.S.L. WEEK 4444, 4448-49 (June 11, 1957).

which "can be protected only by national action in concert with that of another power." *Id.* at 435. And it conferred rights and imposed obligations upon both signatories. *Id.* at 431. The treaty power's relative freedom from constitutional restraint, so far as it attaches to "any matter which is properly the subject of negotiation with a foreign country," *Ware* v. *Hylton*, 3 Dall. 199 (1796), is a long-established fact. *Geofroy* v. *Riggs*, 133 U.S. 258 (1890). No court has ever said, however, that the treaty power can be exercised without limit to affect matters which are of purely domestic concern and do not pertain to our relations with other nations.

Our present Secretary of State has said that the treaty power may be exercised with respect to a matter which "reasonably and directly affects other nations in such a way that it is properly a subject for treaties which become contracts between nations as to how they should act"; and not with respect to matters "which do not essentially affect the actions of nations in relation to international affairs, but are purely internal."[10] He had earlier said:

> . . . I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.[11]

Charles Evans Hughes, just before he became Chief Justice and after he had been Secretary of State, addressing himself to the question whether there is any constitutional limitation of the treaty power, said:

> . . . . The Supreme Court has expressed a doubt whether there could be any such . . . . But if there

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[10] *Hearings on S.J.RES. 1 Before a Subcommittee of the Senate Judiciary Committee*, 84th Cong., 1st Sess. 183 (May 2, 1955).

[11] *Hearings on S.J.RES. 1 and S.J.RES. 43 Before a Subcommittee of the Senate Judiciary Committee*, 83d Cong., 1st Sess. 825 (April 6, 1953).

is a limitation to be implied, I should say it might be found in the *nature* of the treaty-making power.

> . . . The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns . . . the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdiction of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[12]

In the Dulles view this reservation, if part of the treaty, would be an invalid exercise of the treaty power. In the Hughes view, its constitutionality would be a matter of grave doubt. "The path of constitutional concern in this situation is clear." *United States* v. *Witkovich*, 353 U.S. 194 (1957). We construe the reservation as an expression of the Senate's desires and not a part of the treaty. We do not decide the constitutional question.

It is argued that, since the reservation was a condition to the Senate's consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty. That argument, we think, was disposed of

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[12] PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1929) 194, 196.

by the Supreme Court in *New York Indians* v. *United States*, 170 U.S. 1 (1898). That case involved a treaty with certain Indian tribes. The Senate, in its resolution of consent to the treaty, had attached certain amendments and declared that "the treaty shall have no force or effect whatever, . . . nor shall it be understood that the Senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto . . . ." *Id.* at 21-22. The amendments which the Senate attached to its resolution consenting to the treaty, as the Supreme Court recognized, were not communicated to the Indian tribes. The Court concluded that the amendments were not part of the treaty. It nevertheless treated the Senate's consent as effective to make the treaty valid and operative. *Id.* at 22-24.

The order under review is set aside and the case remanded to the Federal Power Commission.

It is so ordered.

BASTIAN, *Circuit Judge*, dissenting: Petitioner, Power Authority of the State of New York, petitions under § 313 (b) (16 U.S.C. § 8251) of the Federal Power Act to set aside the whole of an order of the respondent, Federal Power Commission. That order dismissed petitioner's application for license under § 4 (e) (16 U.S.C. 797e) of the Federal Power Act for a power project. The application was for a license for a proposed hydro-electric development, including facilities for the diversion from the Niagara River of all of the water available under the 1950 Treaty between the United States and Canada.

Being doubtful of its power to act on the application for license because of a reservation made in the treaty

as a condition to the advice and consent of the United States thereto, the Commission heard oral argument on the application of the 1950 Treaty and the reservation. Thereafter, finding itself without authority to issue a license for the project, the Commission ordered the application dismissed.

Petitioner filed application for rehearing, which was denied by the Commission's order of January 2, 1957; whereupon, the present petition for review was filed.

The facts are largely undisputed and appear in the opinion and order of the Commission dismissing the application for license, as follows:

> "The application proposes a project which, briefly, would consist of an intake structure located about three miles above the falls on the Niagara River, two covered conduits extending about 4.5 miles from the intake around the falls to a proposed pumping-generating plant and reservoir at Lewiston, New York, an open canal by which the water will be carried about one mile from the pumping-generating plant and reservoir to the main power-house, which is also located at Lewiston at the edge of the river and consists of intake structures on the top of the cliff, and a generating station at the bottom of the cliff containing thirteen 150,000 kw. units.
>
> "Up to now power development on the American side at Niagara Falls has been under the authority of a license issued on March 2, 1921, for Project 16 and now held by Niagara Mohawk Power Corporation. Niagara Mohawk's Schoellkopf generating station at the Falls was rendered inoperative by a rock slide on June 7, 1956, but the company has filed an application requesting authority to restore the station in part. The application of Power Authority proposes that if Niagara Mohawk will consent to the surrender of its license for Project 16 it will sell it an amount of power equivalent to that which it has hitherto produced by this project.
>
> "Power Authority's proposal is designed to make use of all the water available under the 1950 treaty,

the purpose of which was to preserve the beauty of Niagara Falls and to bring about the full use of the water resources of the Niagara River. The American share up to the time of the treaty had been only 32,500 cfs, made available under the treaty of 1909 and through subsequent exchanges of notes between the United States and Canada, and has been utilized, up to the time of the rock slide, by Niagara Mohawk's Project 16. The 1950 treaty increased this amount by providing that the United States and Canada should divide equally the water flowing in the Niagara River (with certain adjustments) less 50,000 cfs at certain times and 100,000 cfs at other times, to preserve the beauty of the Falls.

"When the Senate of the United States on August 9, 1950, advised and consented to the ratification of the 1950 treaty, it included the following reservation:

> The United States on its part expressly reserves the right to provide by Act of Congress for redevelopment, for the public use and benefit, of the United States' shares of the waters of the Niagara River made available by the provisions of the Treaty, and no project for redevelopment of the United States share of such waters shall be undertaken until it be specifically authorized by Act of Congress (1 UST 694, 699).

"Thereafter Canada accepted the reservation and on August 24, 1950, the treaty, including the reservation, was ratified by the President of the United States. It was ratified by Canada on October 5, 1950. Ratifications were exchanged at Ottawa on October 10, 1950. The treaty was proclaimed by the President on October 30, 1950, and entered into force October 10, 1950."

On these facts the Commission very properly concluded that it had no power to determine the constitutionality of an act of Congress, and ruled:

"Where, as here, there is action by the Senate, which was ratified by the President purportedly under the treaty-making power of the Constitution, we likewise